INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	2
Argument	5
Conclusion	11

CITATIONS

Cases:

Capps v. *United States*, 137 F. Supp. 721	6
Carlin v. *United States*, 100 F. Supp. 451	7
Cuiffo v. *United States*, 131 C. Cls. 60	8
Commings v. *United States*, 89 C. Cls. 498	9
Creary v. *Weeks*, 259 U. S. 336	10
Denby v. *Berry*, 263 U. S. 29	10
Duff v. *United States*, 135 F. Supp. 527	8
Field v. *United States*, C. Cls. 525–53, June 5, 1956	5
Girault v. *United States*, 135 F. Supp. 521	5, 8
Lemly v. *United States*, 109 C. Cls. 760	9
MacFarlane v. *United States*, 140 F. Supp. 420	5, 8
Odell v. *United States*, 135 F. Supp. 539	6, 8
Orloff v. *Willoughby*, 345 U. S. 83	10
Oro Fino Consolidated Mines, Inc. v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U. S. 948	6
Randolph v. *United States*, 69 F. Supp. 156, affirmed, 158 F. 2d 787	8
Reaves v. *Ainsworth*, 219 U. S. 296	10
Rosnick v. *United States*, 132 C. Cls. 1, rehearing denied, 132 C. Cls. 6	6
Soukaras v. *United States*, 140 F. Supp. 797	8
Spencer v. *United States*, 102 F. Supp. 774, certiorari denied, 344 U. S. 828	7
Tanner v. *United States*, 129 C. Cls. 792, certiorari denied, 350 U. S. 842	8, 9
Uhley v. *United States*, 121 F. Supp. 674	7
Wales v. *United States*, 132 C. Cls. 765	10

Statutes:

	Page
Act of April 3, 1939, 53 Stat. 557, 10 U. S. C. 456	3
Act of July 25, 1947, 61 Stat. 451	2
Career Competition Act of 1949, 63 Stat. 816, 37 U. S. C. 272, section 402 (a)	10
Emergency Powers Continuation Act, 66 Stat. 333, Section 1 (c)	2
National Defense Act (Act of June 3, 1916, as amended, 39 Stat. 189), Section 37	2
R. S. 1245, 10 U. S. C. (1946 Ed.) 931	10
R. S. 1246, 10 U. S. C. (1946 Ed.) 961	3
R. S. 1246–1253, 10 U. S. C. (1946 Ed.) 961–966	10
R. S. 1248, 10 U. S. C. (1946 Ed.) 963	3
R. S. 1249, 10 U. S. C. (1946 Ed.) 964	3
42 Stat. 1033, 10 U. S. C. (1946 Ed.) 352, 358	2
5 U. S. C. 191 (a)	8
28 U. S. C. 2501	2
38 U. S. C. 693 (i)	7

Miscellaneous:

H. Res. 199, Sept. 22, 1941, 55 Stat. 728, 729	2
Proclamation 2974, April 28, 1952, 17 F. R. 3813	2

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 471

WILLIAM R. BARKER, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 140 F. Supp. 415.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956. Petitioner's motion for rehearing, timely filed, was denied July 12, 1956, and his petition for a writ of certiorari was filed on September 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the claim of petitioner, an officer in the Army of the United States released from active duty

in 1947 "not by reason of physical disability," is barred by the six-year statute of limitations in the Court of Claims.

STATUTE INVOLVED

28 U. S. C. 2501 provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

STATEMENT

Petitioner held commissions in the Officers Reserve Corps and the Army of the United States, neither of which is a component of the Regular Army, under emergency legislation (Deft. Ex. A). After honorable war service during the course of which he was wounded, petitioner, in common with many officers holding comparable commissions, was demobilized as of July 25, 1946, and reverted to inactive status (Deft. Ex. B).[1] His release to inactive duty was "not by

[1] Commissions in the Army of the United States were issued for the duration of World War II and six months or for a period stated in the commission itself (H. Res. 199, Sept. 22, 1941, 55 Stat. 728, 729). Such commissions were terminable at any time at the pleasure of the President or by Act of Congress. Congress, in fact, terminated these commissions as of July 1, 1948 (Act of July 25, 1947, 61 Stat. 451). Reserve commissions of the type held by petitioner were granted pursuant to Section 37 of the National Defense Act (Act of June 3, 1916, as amended, 39 Stat. 189; 42 Stat. 1033, 10 U. S. C. (1946 Ed.) 352, 358) and were terminated on April 1, 1953. Proclamation 2974, April 28, 1952, 17 F. R. 3813; Section 1 (c) of Emergency Powers Continuation Act, 66 Stat. 333.

reason of physical disability," *i. e.*, petitioner was not released because he was considered unfit to perform the duties of an officer (Deft. Ex. B).

In February 1947, petitioner was recalled to active duty status and assigned to Murphy General Hospital for the purpose of physical examination and appearance before an Army Retiring Board.[2] After this examination and hearing, the Board found that petitioner was not permanently incapacitated for active service and recommended that, if assigned, petitioner be assigned to full military duty with a waiver for mild deformity and limitation of movement in his left arm (Pl. Ex. 3). This finding was concurred in by the Surgeon General and approved by the Secretary of War on April 24, 1947 (Deft. Ex. A).

At the hearing before the Board, petitioner stated that he desired to be relieved from active duty and did not desire to remain on active duty with a waiver (Pl. Ex. 3). On May 7, 1947, petitioner was ordered released to inactive duty in the Reserve (Deft. Ex. C).

By order dated February 21, 1951, petitioner was recalled for one day's active duty for the purpose of undergoing a physical examination preliminary to planned orders for extended active duty in the Korean theater (Deft. Ex. D). The examination thus con-

[2] Army Retiring Boards, at the time here material, were convened pursuant to R. S. 1246, 10 U. S. C. (1946 Ed.) 961, and were charged with the function of determining whether an officer, appearing before the board, was capable of discharging the duties of his office. R. S. 1248, 1249, 10 U. S. C. (1946 Ed.) 963, 964. Access to these boards for non-regular officers was created by the Act of April 3, 1939, 53 Stat. 557, 10 U. S. C. 456.

ducted resulted in a finding that he was not qualified for extended active duty (Deft. Ex. E, Item 77).[3] Petitioner was thereafter notified that he had the choice of being separated entirely from the service or of being transferred into the Honorary Reserve (Pl. Ex. 4). He was transferred into the Honorary Reserve (Deft. Ex. F; Pl. Ex. 5).

Asserting an inconsistency between the result reached in 1947 and in 1951 as to his physical qualifications as an officer, petitioner thereafter sought on various occasions to obtain an administrative determination that he had been permanently disqualified to serve as an officer since 1946 and was entitled to disability retired pay. These requests were refused by the Army (Deft. Exs. G, H, and J). After formal procedures were utilized, the Army, in 1954, again accorded petitioner a complete physical examination. Petitioner was again found "* * * qualified for General Duty * * *" (Deft. Ex. K). Reviewing the result of this physical examination, a board of medical officers found petitioner "* * * not incapacitated" for military duty and "* * * capable of performing general military service in a limited capacity" (Deft. Ex. L).

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[3] The special factors entering into the selection of officers for extended active duty in battle are obvious, and the negative result reached as to petitioner's qualifications for this purpose are in no way inconsistent with the findings of the 1947 Retiring Board. The 1947 Board recognized that petitioner's usefulness for extended active duty was questionable but that he was otherwise fully qualified (Pl. Ex. 3, pp. 2, 3). At the 1947 hearing, petitioner himself recognized his limitation for purposes of combat duty. *Id.*, p. 4.

This suit was instituted in the court below on March 14, 1955 (R. 1). On the basis of the events set out above, petitioner requested that court to declare him permanently incapacitated at all times since his release from active duty in 1946 and to award him disability retired pay from that date (R. 4). The Government moved for summary judgment, urging that petitioner's cause of action, if any, accrued more than six years before the filing of the complaint and pointing out that the subject matter of the case was committed to the exclusive control of the Army and therefore beyond the jurisdiction of the court (R. 5; Deft. Motion for Summary Judgment). Petitioner also moved for summary judgment (R. 7). The court held that petitioner's cause of action accrued on May 14, 1947, the date on which he was released to inactive duty without entitlement to disability retired pay (R. 11–14).

ARGUMENT

1. Assuming the power of the Court of Claims to review factual determinations of a highly technical nature committed by statute to the discretion of the armed services (see *infra,* pp. 9–11), we think that court correctly held that petitioner's cause of action accrued when he was released to inactive duty pursuant to the 1947 Retiring Board recommendation, approved by the Secretary of War. This holding is in accord with numerous decisions of the Court of Claims on similar questions. See, *e. g., Field* v. *United States,* C. Cls. 525–53, June 5, 1956; *MacFarlane* v. *United States,* 140 F. Supp. 420; *Girault* v. *United*

States, 135 F. Supp. 521; *Odell* v. *United States,* 135 F. Supp. 539; *Rosnick* v. *United States,* 132 Cls. 1, rehearing denied, 132 C. Cls. 6. In each of these cases, the court has recognized that a claim for disability retired pay matures at the latest when the officer is notified of his release without entitlement to such pay by the Secretary after recommendation by a retiring board.

Concededly, some inconsistent rules appear to have been announced by the Court of Claims in dealing with this general class of cases. But, narrowly construed, many, if not all, of these decisions can be reconciled with the proper rule announced in this case. For example, petitioner relies upon a statement in the *Rosnick* case, *supra,* to the effect that a new cause of action accrues where the decision of a review board is arbitrary, a statement which, of course, would vary the actual period of limitations available to an officer claimant.[4] The *Rosnick* case actually applied the same rule as that governing here and the statement to which petitioner points is dictum. Again, petitioner points to *Capps* v. *United States,* 137 F. Supp. 721, for the same proposition. In the *Capps* case, the court held

[4] It should be noted that the petition in this case contains a naked allegation that the Army Board for the Correction of Military Records "arbitrarily" denied petitioner's application (R. 2). An examination of the record in the case discloses that there could be no substance to this charge. And the Court of Claims itself has recognized that the creation of a cause of action to review arbitrary action is not a mere matter of pleading. See *Rosnick* v. *United States,* 132 C. Cls. 6; *Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, certiorari denied, 341 U. S. 948.

that a claimant's right to disability retired pay, established by the substitution by the Secretary of War of a corrected regulation under the statute, could not be defeated by a Disability Review Board on second hearing by a reexamination of the original facts of record. The court held that, "under these peculiar facts," a separate claim accrued to review this second erroneous action of the Disability Review Board.[5]

Apart from certain inconsistent *statements,* the Court of Claims has never *held* that a cause of action does not accrue for disability retired pay when an officer is separated from service. Nor has it ever *held* that the statute of limitations is tolled as to the cause of action which thus accrues by the availability to the claimant of a statutory review within the services.[6]

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[5] Again, under peculiar facts, a new cause of action was held, in *Uhley* v. *United States*, 121 F. Supp. 674, to arise to review rejection of a claim for disability retired pay presented for the first time to the Board for the Correction of Military Records. The result of such a decision is inconsistent in effect with the principle applied in the instant case and many similar cases. The Government has not accepted the *Uhley* decision (which was interlocutory) nor does it agree that the actions of Disability Review Boards or of the Board for the Correction of Military Records are ordinarily reviewable. Cf. the Court of Claims decisions in *Carlin* v. *United States*, 100 F. Supp. 451; *Spencer* v. *United States*, 102 F. Supp. 774, certiorari denied, 344 U. S. 828, and the Government's brief in opposition in *Spencer*, No. 164, Oct. Term 1952, at pp. 5 *ff.*

[6] The Court of Claims has itself recognized the extreme results of any such holding. It should be remembered that, in proper cases, review may be sought before a Disability Review Board at any time within 15 years of the final action following retiring board proceedings. 38 U. S. C. 693 (i). Again, application to the Board for the Correction of Military Records may be made within three years after date of dis-

On the contrary, it has consistently held that the availability of administrative remedies does not toll the statute of limitations. *Cuiffo* v. *United States,* 131 C. Cls. 60; *Duff* v. *United States,* 135 F. Supp. 527; *Girault* v. *United States,* 135 F. Supp. 521; *MacFarlane* v. *United States,* 140 F. Supp. 420; *Soukaras* v. *United States,* 140 F. Supp. 797.[7]

The short of the matter is this: Here, as in all similar cases, whatever claim petitioner had accrued in 1947 when he was released to inactive duty without entitlement to disability retired pay. His rights, if any, were fixed at that time and nothing in the permissive statutory review system available to him within the Army tolled the running of time on the judicial assertion of his rights.[8] Accordingly, the de-

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covery of the alleged error or injustice or ten years after date of enactment of the statute creating that Board. 5 U. S. C. 191 (a). Recognizing these time factors, the Court of Claims said, in *Odell* v. *United States*, 135 F. Supp. at p. 541: "* * * But we think that Congress did not, by this provision, intend that cases might be brought in this court 21 years after the pertinent facts had occurred."

[7] There is no need to discuss petitioner's reliance on the district court opinion in *Randolph* v. *United States*, 69 F. Supp. 156 (S. D. Tex.), erroneously shown in the petition for certiorari as arising in the District of Columbia. The *Randolph* case, affirmed on appeal, 158 F. 2d 787 (C. A. 5), has no connection with the problem of exhaustion of remedies or the impact of that doctrine in tolling the statute of limitations. The case held that a district court suit for an officer's disability retired pay was an unconsented suit against the United States and was not within the scope of the Tucker Act since it was a suit for a "pension."

[8] It should be observed that the Court of Claims has never dismissed a case of this type for prematurity where it appeared that the officer claimant had not invoked the internal service mechanism for review, another indication of the position of the Court of Claims that such remedies are purely permissive.

cision below is correct and in accord with the settled law, and there is no occasion for review by this Court.

2. There is, we think, additional reason why review should not be granted. The Court of Claims has exercised traditional jurisdiction in certain types of military pay cases, namely, those in which the question presented for decision involved no inquiry by the court into factual and technical questions of basic entitlement committed by statute to the exclusive jurisdiction of the armed services. In the usual case, the court was called upon, on an undisputed set of facts, to determine the meaning of a statute or regulation for the purpose of pay computation. See, *e. g., Tanner* v. *United States,* 129 C. Cls. 792, certiorari denied, 350 U. S. 842; *Commings* v. *United States,* 89 C. Cls. 498.[9] The case of *Lemly* v. *United States,* 109 C. Cls. 760, decided in 1948, marks the first occasion on which the Court of Claims assumed jurisdiction to review and reverse *factual* determinations fixing the basic relationship between a service and its officers, *i. e.,* whether an officer should be retained or separated and, if separated, in what status. Problems of accrual of causes of action, such as that presented here, stem from this assumption of jurisdiction. In our view, there is at least great doubt as to whether the matters which the Court of Claims is now reviewing in this

[9] These cases constitute the so-called continuing claim cases to which petitioner attempts to resort. In a proper continuing claim case, a determination of a question of law in the claimant's favor merely requires that judgment be given for the amount of the monthly payment so determined for the period in suit but not to exceed six years. See, *e. g., Commings* v. *United States, supra.*

area are within its power. The basic relationship between the military services and their officers—retention or separation—is committed by statute to the discretion of the President or the Secretaries. The statutes in this case are illustrative; see R. S. 1245, 10 U. S. C. (1946 Ed.) 931; R. S. 1246–1253, 10 U. S. C. (1946 Ed.) 961–966.[10] Nothing could be more crucial to internal military management than the question, arising in countless cases and in infinitely varied circumstances, of the status of its officers. And it has been repeatedly held that courts are without power to interfere in matters of internal management of military establishments. See, *e. g., Orloff* v. *Willoughby,* 345 U. S. 83, 93; *Denby* v. *Berry,* 263 U. S. 29; *Reaves* v. *Ainsworth,* 219 U. S. 296; *Creary* v. *Weeks,* 259 U. S. 336, 344.

The Court of Claims appears to have recognized this general rule of non-interference by the judiciary in cases involving the question really presented by this case, namely, whether an officer is medically fit or not to serve in the military forces. In *Wales* v. *United States,* 132 C. Cls. 765, the court said (at p. 769):

> The Medical Board found that plaintiff was fit for general military duty at the time of his release by the Secretary to inactive duty. This finding still stands. This court can not under-

[10] These and similar disability retirement statutes have been replaced by Section 402 (a) of the Career Compensation Act of 1949, 63 Stat. 816, 37 U. S. C. 272a. The Career Compensation Act continues the discretionary power of the services to deal with the question of retirement for disability.

take to determine who is fit or unfit to serve in the military forces. *Holliday* v. *United States* [128 C. Cls. 647]. *Beamish* v. *United States,* 130 C. Cls. 767, 128 F. Supp. 158. And, as stated in *Orloff* v. *Willoughby,* 345 U. S. 83:

> * * * judges are not given the task of running the Army. * * * Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

We submit that this principle of the *Wales* case completely disposes of this case. Petitioner is asking that a court declare him unfit to serve as an officer, after the Army has called him fit. This a court cannot do.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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